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LAW OFFICES  
KOTEEN & NAFTALIN

1150 CONNECTICUT AVENUE  
WASHINGTON, D.C. 20036

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TELEPHONE (202) 467-5700  
TELECOPY (202) 467-5915  
CABLE ADDRESS "KOBURT"

BERNARD KOTEEN  
ALAN Y. NAFTALIN  
RAINER K. KRAUS  
ARTHUR B. GOODKIND  
GEORGE Y. WHEELER  
HERBERT D. MILLER, JR.  
MARGOT SMILEY HUMPHREY  
PETER M. CONNOLLY  
CHARLES R. NAFTALIN

M. ANNE SWANSON  
GREGORY C. STAPLE  
OF COUNSEL

September 4, 1992

ORIGINAL  
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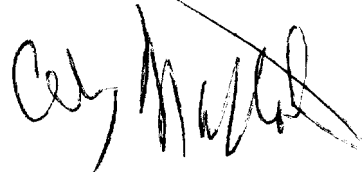
Donna Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N. W.  
Washington, D. C. 20554

Dear Ms. Searcy:

Transmitted herewith, on behalf of Gabelli Funds, Inc. and Mario J. Gabelli, respondents in MM Docket No. 92-201, is their Motion for Clarification of *Order to Show Cause* in that proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Alan Y. Naftalin

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D. C. 20554

IN RE ORDER TO SHOW CAUSE  
DIRECTED AGAINST

**MARIO J. GABELLI**

AND

**GABELLI FUNDS, INC.**

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SEP 4 1992  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket No.

92-201

TO: Honorable Joseph Stirmer  
Chief Administrative Law Judge

**Motion for Clarification of  
*Order to Show Cause***

Gabelli Funds, Inc. and Mario J. Gabelli (collectively referred to as "Investors") file herewith, by their attorneys, their Motion for Clarification of the *Order to Show Cause* ("Order") herein, released on August 21, 1992 (FCC 92-377), by issuance of a ruling that the *Order* does not authorize the assessment of any forfeiture in this proceeding.

The *Order* herein directs Investors to show cause why they should not be ordered to cease and desist from violating specified sections of the Commission's Rules and of the Communications Act of 1934, as amended (Para. 5). It imposes information reporting requirements on Investors (Para. 6), and places the burdens of going forward and of proof upon the Chief, Mass Media Bureau (Para. 9). It does **not** purport to invoke the forfeiture provisions of Section 503(b)(3) or 503(b)(4) of the rules. Instead, it states:

"To the extent necessary, this order also constitutes a citation, pursuant to Section 503(b)(5) of the Communications Act, 47 U.S.C. §503(b)(5). Pursuant to Section 503(b)(5), Mr. Gabelli or Gabelli Funds, Inc. may

request a personal interview with an official of the Commission at the field office nearest to is [sic] place of residence or at the Commission's offices in Washington, D. C. Future conduct in violation of the rules and statutory provisions set forth above may lead to forfeitures of up to \$25,000 [sic] per day per violation."<sup>1</sup>

Paragraph 10 contains the **only** reference in the *Order* to forfeitures.

47 U.S.C. §503(b)(5), cited in the *Order*, provides:

"No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission **unless, prior** to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator or if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph." (emphasis added)

The *Order* cites Section 503(b)(5) because Investors hold no Commission license or other authorization; are not an applicant for any license or other authorization; are not engaged

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<sup>1</sup> The *Order* is in error as to the quantum of the forfeiture. The maximum statutory amount is \$10,000 per day per violation, not \$25,000, see 47 U.S.C. §503(b)(2)(C).

in activities requiring a license or other authorization; and are not a cable television system<sup>2</sup>.

Prior to the 1978 enactment of 47 U.S.C. §503(b)(5), the Commission lacked forfeiture authority with respect to non-licensees. In granting the Commission authority to impose forfeitures on non-licensees, the Congress deemed it important to provide "a special procedural protection in addition to the provisions of paragraphs (3) and (4)." (Senate Report 95-580, p. 25). The Senate Report concerning the new section states:

"S.1547, as reported, requires that a forfeiture liability could arise only after a person has been served personally or by certified or registered mail with a notice. In addition, it contains a special procedural protection comparable to existing law for those persons who will be made subject to forfeiture liability for the first time and **who are presumed to be unaware of Commission regulations**. For persons who are not required to hold a license, permit, certificate, or other authorization issued by the Commission, no forfeiture may attach unless prior to the issuance of any notice the Commission has sent a citation for the violation and has provided an opportunity for a personal interview and the person has thereafter engaged in the prohibited conduct. This special citation procedure and interview requirement protects persons who would otherwise be subject to immediate forfeiture for willful violations such as altering electronic devices which emit electromagnetic radiation (such as garage door openers or electronic water heaters or electronic ovens) in violation of FCC rules. Such a person could not be subject to forfeiture until there was **clear evidence** through the issuance of a citation of violation and interview opportunity **that he or she was aware of the applicability of the Commission's rules and regulations governing the proscribed behavior**. Only if he or she **thereafter** engaged in the conduct for which the citation of violation was

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<sup>2</sup> For purposes of economy, the entities reached by 47 U.S.C. §503(b)(5) are collectively referred to here as "non-licensees." The *Order* acknowledges, by reliance on 47 U.S.C. §503(b)(5), that the Investors are in the class of individuals to whom that section applies. They are neither a licensee nor an applicant. Rather, they are mere minority stockholders in some licensees, and non-stockholder investment advisors to stockholders in other licensees. Their stock holdings and investment activities are periodically reported to the SEC and are a matter of public record. Prior to the release of the *Order*, they had never been advised by the Commission that any of their activities were actually or even potentially violative of any Commission rule or policy, or of the Communications Act.

sent could a notice of liability be issued."<sup>3</sup> (Senate Report No. 95-580, p. 9) (emphasis added).

The Commission has recognized that before a forfeiture may be imposed on a non-licensee,

"that person must have been sent a citation of the violation charged, been given a reasonable opportunity for a personal interview with an official of the Commission, and have subsequently engaged in the conduct described in the citation. Those who have a closer relationship with the Commission through the licensing processes are subject to fines for rule violations, without a prior warning and an opportunity to desist from the violation." (*Notice of Proposed Rule Making in re CATV Certificate of Compliance*, 68 F.C.C. 2d 688, 694 (1978).

The Commission has also consistently interpreted Section 503(b)(5) to mean that forfeiture proceedings against non-licensees "can only be initiated for a **second** violation, after issuance of a citation in connection with a **first** violation." *Standards for Assessing Forfeitures, Appendix*, n.1, 70 RR 2d 1206 (1992) (emphasis added); see also *Airborne Use of Cellular Telephones and use of Cell Enhancers*, 70 RR 2d 177, 179 n. 13 (1991). For example, in *Thomas C. Harper, President, Radio Officers Union*, 65 RR 2d 754 (1988), the Commission had warned the Radio Officers Union that it had solicited improper *ex parte* presentations in a restricted proceeding. As early as February 1, 1988, copies of letters from the Commission's managing director to the senders of the *ex parte* presentations, stating that they violated the Commission's rules, had been sent to the Union. The Union nevertheless persisted in soliciting more *ex parte* presentations. By letter released on November 4, 1988, the Union was cited pursuant to 47 U.S.C. §503(b)(5) and advised:

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<sup>3</sup> The Senate Report was cited by the Commission in a letter sent to Sol Schildhouse, Esq. concerning the non-applicability of Section 503(b)(5) to CATV companies, 57 RR 2d 1627, 1628.

"[T]his letter constitutes a citation that the ROU has violated the Commission's *ex parte* rules. Pursuant to Section 503(b)(5), the ROU is entitled to a personal interview with an official of the Commission regarding its rule violation. Should the ROU wish to take advantage of such an opportunity, it should contact the Office of General Counsel, Administrative Law Division, at 632-6990. Should the ROU engage in future violations of the type described herein, it may be subject to forfeiture proceedings." (65 RR 2d at 755).

Therefore, under 47 U.S.C. §503(b)(5), no Notice of Apparent Liability can be issued to Investors pursuant to 47 U.S.C. §503(b)(4), and no "forfeiture penalty may be determined . . . after notice and opportunity for a hearing" under 47 U.S.C. §503(b)(3),

- ▶ until **after** the Commission has complied with 47 U.S.C. §503(b)(5) by sending Investors a "citation of the violation charged" and
- ▶ until **after** they have been given a "reasonable opportunity for a personal interview" to become "aware of the applicability of the Commission's rules and regulations governing the proscribed behavior;" and
- ▶ unless and until they **subsequently** engage in proscribed conduct of the same type.

**None** of these things had happened **prior to** the release of the *Order*; **all** of them had to happen **before** a Notice of Apparent Liability could be issued under 47 U.S.C. §503(b)(4) or an "opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5" could be provided under 47 U.S.C. §503(b)(3). Therefore, the *Order* is neither of those things, and it accordingly does not itself authorize the Presiding Administrative Law Judge to impose any forfeiture against Investors in this proceeding.

The *Order* purports to constitute the "citation" to which 47 U.S.C. §503(b)(5) refers, but only "to the extent necessary" (*Order*, para. 10). Investors do not completely understand the meaning of this statement, and to the extent that they do understand it, they disagree with it because the *Order* generally lacks the requisite specificity and, to the extent it is specific, it is in many respects factually wrong. In any event, the required citation must provide a description of the allegedly violative conduct, see 47 U.S.C. §503(b)(5). In many respects, the *Order* simply alleges that Investors's holdings are "unclear" (*Order*, para. 2) and that they **may** hold interests violative of "these and other multiple or cross-ownership restrictions." (*Order*, para. 3). At least as to the holdings not set forth in the *Order*, and as to the rules not specifically cited, it seems obvious that the *Order* cannot constitute the required "citation."

Moreover, the *Order* does not provide the required "reasonable opportunity for a personal interview" to become "aware of the applicability of the Commission's rules and regulations governing the proscribed behavior." That opportunity cannot be provided until **after** the present hearing, for several reasons:

- ▶ The Presiding Administrative Law Judge is not **now** in a position to conduct the "personal interview" to which Investors are statutorily entitled, because he cannot know what behavior there was, or whether it was proscribed, until after the Bureau has met the burdens of going forward and of proof **and** until after Investors have thereafter been given an opportunity to present their own evidence;

- ▶ The Presiding Administrative Law Judge will not **hereafter**<sup>4</sup> be in a position to conduct the "personal interview" and thereby create "clear evidence that . . . [Investors were] . . . aware of the applicability of the Commission's rules and regulations governing the proscribed behavior." The giving of such explanations, and the creation of such evidence, is not a judicial function, and to do those things would remove the Presiding Administrative Law Judge from his judicial role and place him in a prosecutorial role<sup>5</sup>;
- ▶ No other "official of the Commission" is presently in a position to conduct the required "personal interview," either. Since the Commission found it necessary to proceed by issuance of the *Order* rather than under 47 U.S.C. §503(b)(5) alone<sup>6</sup>, and to require Investors to provide information about all of their broadcast and non-broadcast holdings, it is evident that even the Commission is not now

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<sup>4</sup> Except perhaps through the issuance of a cease and desist order, see p. 9, *infra*.

<sup>5</sup> The *Order* does not direct him to do these things, and there is no reason to assume that it contemplates that he will abandon his judicial role to do them.

<sup>6</sup> The Commission clearly had such an option. The *Order to Show Cause* was issued pursuant to 47 U.S.C. §§312(b) - (c), enacted even before the Congress expanded the Commission's forfeiture authority to extend, under 47 U.S.C. §503(b)(5), to non-licensees. The Senate Report on adoption of §503(b)(5) noted:

"[T]he Commission has argued that other enforcement alternatives are cumbersome and time-consuming procedures which are inappropriate for relatively minor violations. The Commission may enter a cease-and-desist order followed by a civil contempt proceeding which the Department of Justice must agree to prosecute. The cease-and-desist order is particularly cumbersome because the violator is entitled to an FCC order to show cause why a cease and desist order should not be issued. There is then a reply period of at least 30 days with the opportunity for a full evidentiary hearing. Only then can the FCC issue a cease and desist order which must specify findings, grounds and reasons, and the effective date. . . . Failure to obey that order then becomes subject to civil contempt proceedings by the Department of Justice in a U.S. district court." ( Senate Report No. 95-580)



sufficiently familiar with the allegedly "proscribed behavior" to afford Investors a "reasonable opportunity for a personal interview" to become aware of the applicability to that behavior of the Commissions rules. The **only** purpose for offering to conduct an interview in these circumstances would be a transparent attempt to make Investors liable to forfeiture for any alleged violations continuing after that interview. That would be inconsistent with the conduct of the present proceeding, since it would require Investors to terminate all **alleged** violations even **before** the present hearing had resulted in determinations that there were, in fact, any **actual** violations, or that a cease and desist order is required. It would do so long before the effective date here found to be appropriate for any cease and desist order which ultimately issues. It would require them to do so on pain of being assessed a substantial forfeiture for each day of alleged continuing violation, by Notice of Apparent Liability<sup>7</sup> for them.<sup>8</sup> A situation might well arise under which Investors would be forced to abandon conduct later found in this proceeding to be neither violative of the rules nor to warrant issuance of a cease and desist order.

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<sup>7</sup> If the Commission were to attempt to proceed in this fashion, we assume that it would rely upon the Notice of Apparent Liability vehicle provided for in 47 U.S.C. §503(b)(4) -- even though it would afford Investors an opportunity for a trial *de novo* in Federal District Court -- rather than *via* a hearing proceeding, independent of the present proceeding, pursuant to 47 U.S.C. §503(b)(3).

<sup>8</sup> By expressly limiting forfeitures against Investors to "**future** conduct in violation of the rules and statutory provisions set forth above. . . ." (FCC 92-377, para. 10) (emphasis added), the Commission has apparently determined that no effort will be made to seek forfeitures for **past** violations.

### Conclusion


The *Order* is an unartful attempt to combine inconsistent enforcement vehicles, the show cause procedures of §312 and the forfeiture procedures of §503(b)(5). There is no reported case in which this has previously been attempted, and there is no truly reasonable way to interpret the *Order*. However, one way to give it some element of rationality is to interpret paragraph 10 of the *Order* to mean that if the Presiding Administrative Law Judge is the Commission official who is to conduct the "personal interview," his "explanation" of the violation must be in the form of any cease and desist order which he may hereafter issue, and that no forfeiture may be imposed pursuant to §§503(b)(3)-(4) **unless** and **until** the cease and desist order is thereafter violated. That, of course, would take place, if at all, after the close of the record here and after the Presiding Administrative Law Judge's jurisdiction over the matter has terminated. That would be consistent with the purpose of a cease and desist order, which is remedial rather than punitive, and would provide the Commission with remedies for violation which transcend those available under the cease and desist procedures alone. Under 47 U.S.C. §312(c), the cease and desist order must specify an effective date, and presumably in deciding on the effective date, the Presiding Administrative Law Judge will consider the time needed to come into compliance. Such an interpretation would also be consistent with the purpose of §503(b)(5), which is to limit the imposition of forfeitures on non-licensees such as Investors to situations where there is "clear evidence" of violation with knowledge of both the facts and the Commission's rules applicable to them.

In light of the above, it is requested that the Presiding Administrative Law Judge clarify the *Order* by affirming that it confers no forfeiture authority on him; that no forfeitures can be imposed here, and that by virtue of the initiation of the present

proceeding, the Commission has no authority independently of this proceeding to proceed under 47 U.S.C. §503(b)(5) to lay the foundation for the imposition of forfeitures pursuant to 47 U.S.C. §§503(b)(3) or (4). Rather, the Commission must defer proceeding under 47 U.S.C. §§503(b)(4) or (4) until any cease and desist order becomes effective and is thereafter violated.

Respectfully submitted,

**Gabelli Funds, Inc. and  
Mario J. Gabelli**

By  /s/ Alan Y. Naftalin  
Alan Y. Naftalin

By  /s/ Herbert D. Miller, Jr.  
Herbert D. Miller, Jr.

By  /s/ M. Anne Swanson  
M. Anne Swanson

KOTEEN & NAFTALIN  
SUITE 1000  
1150 CONNECTICUT AVENUE, N. W.  
WASHINGTON, D. C. 20036

*Their attorneys*

September 4, 1992


## Certificate of Service

I, Donna Rhudy, a secretary in the law firm of Koteen & Naftalin, hereby certify that I have this date sent copies of the foregoing to the following by Hand Delivery:

Honorable Joseph Stirmer  
Chief Administrative Law Judge  
Federal Communications Commission  
Room 224  
2000 L Street, N.W.  
Washington, D. C. 20554

Roy J. Stewart, Esq.  
Chief, Mass Media Bureau  
Federal Communications Commission  
Room 314  
1919 M Street, N.W.  
Washington, D.C. 20554

Larry Miller, Esq.  
Gary Schonman, Esq.  
Hearing Branch  
Federal Communications Commission  
Room 7212  
2025 M Street, N.W.  
Washington, D. C. 20554

  
/s/ Donna Rhudy  
Donna Rhudy

September 4, 1992